BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RICKY E. ARNOLD	)	
Claimant	)	
VS.	)	
	)	Docket No. 205,689
MEIER'S READY MIX, INC.	)	
Respondent	)	
AND	)	
	)	
KANSAS AGGREGATE READY MIX ASSOC.	)	
Insurance Carrier	)	

ORDER

Respondent appeals from an Award entered by Special Administrative Law Judge Cortland Q. Clotfelter on January 14, 1998. The Appeals Board heard oral argument July 15, 1998.

APPEARANCES

James L. Wisler of Topeka, Kansas, appeared on behalf of claimant. Matthew S. Crowley of Topeka, Kansas, appeared on behalf of respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

1. What is the nature and extent of claimant's disability? The Special Administrative Law Judge found a 72 percent work disability based on a 44 percent task loss and a 100 percent wage loss. Respondent contends claimant has not proven any permanent disability or at least should be limited to disability based on functional impairment.

2. Is claimant entitled to future medical expenses?

3. Who should pay costs of the independent medical examination performed by Dr. Harold M. Voth? Respondent argues it should not be obligated to pay for the examination report done to evaluate a psychological condition when the conclusion was that claimant was malingering.

4. Is claimant limited under K.S.A. 44-501 to an award of medical expenses because he was not disabled for one week from earning full wages?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes the Award should be modified to one based on a functional impairment and disability of 8 percent.

Findings of Fact

1. Claimant worked for respondent from 1989 to 1995. He initially drove a truck, then batched concrete using a computer, dispatched, and finally managed a concrete plant.

2. On April 17, 1995, claimant suffered injury to his neck and head when a ladder, attached to a cement truck, fell and struck him on the head.

3. On the day of the accident, claimant saw Dr. Dick Geis. Claimant did not work for the remainder of the day, but Dr. Geis released him to return to work the next day. Claimant initially complained of problems with pain in his neck. Claimant also had daily headaches and problems with loss of concentration, problems with motor skills, and stuttering.

4. On August 24, 1995, claimant injured his right arm at work. This second injury was the subject of a separate workers compensation claim settled September 4, 1996. The parties made it clear at the settlement that they were settling on the August 24, 1995, injury to the arm, not the April 17, 1995, injury to the head and neck.

5. After the injury of August 1995, claimant again continued to work for respondent, doing light duty work, until he was told not to work by Vincent R. Meier, the owner of the company. Mr. Meier apparently concluded the time claimant took off for therapy interfered too much with the work. It is not clear from the record how long claimant worked after the August 1995 injury, but once he was taken off work, respondent paid temporary total disability benefits voluntarily until February 1, 1996.

6. Claimant worked part-time for another employer, SARP, in its detoxification program at $7.04 per hour in February and March 1996.

7. In April 1996, claimant filed for a preliminary hearing to obtain additional medical treatment and temporary partial disability benefits. Claimant's counsel stated at that hearing

that he was claiming these benefits for the August 1995 accident and was not claiming benefits for the April 1995 accident at issue here. The ALJ ordered that benefits be provided.

8. After the April 1996 preliminary hearing, respondent returned claimant to work taking phone orders, using the computer, and using the loader occasionally when necessary. Claimant did not do heavy lifting work. But during a period of heavy rain, respondent asked claimant to drive a truck. Claimant drove the truck but had problems with his neck, and Dr. Joseph G. Sankoorikal, the treating physician at the time, recommended claimant not continue. Mr. Meier responded by advising claimant that he could simply sit in a room and do nothing for eight hours a day. He told claimant he could take lunch and could smoke one cigarette each hour. Claimant could not have a television.

9. Rather than sit in the room with nothing to do, claimant left. Mr. Meier then called claimant and advised claimant that if he did not return and sit in the room as he had been told, claimant would be fired. Claimant did not return and respondent did fire claimant. But claimant and respondent communicated again the next day, or within a few days, and respondent offered claimant a job as a security officer. Claimant understood the job would pay 90 percent of his preinjury wage. After first agreeing to the job, claimant changed his mind and rejected the offer. Claimant asserted in his testimony that he thought the job was a made-up job and he did not trust the respondent. This was the reason he did not accept the offer.

10. Dr. P. Brent Koprivica examined and evaluated claimant's injuries on June 25, 1996. Dr. Koprivica concluded that the accident of April 1995 permanently aggravated a preexisting cervical spondylosis with development of a chronic myofascial pain type of symptom. He rated the resulting impairment as 12 percent of the whole body. Of the 12 percent, Dr. Koprivica attributed 5 percent to loss of range of motion and 7 percent to degenerative changes at two levels aggravated by the injury. But Dr. Koprivica had not seen records of neck problems claimant had before the April injury, records from the Farr Chiropractic Clinic. When shown those records at the deposition, he agreed that the records showed a greater loss of cervical range of motion before this April 1995 injury than he found after the injury.

Dr. Koprivica also found an additional 10 percent for closed head trauma and residual, primarily a reactive emotional disorder. He agreed that this 10 percent would depend on what a psychiatrist may or may not say about the reactive disorder. He would defer to the psychiatrist.

Dr. Koprivica recommended restrictions. He recommended claimant be limited to the medium level of work as defined by the *Dictionary of Occupational Titles*. He also specifically felt claimant should avoid repetitive overhead reaching activities, should avoid sustained or awkward postures of the neck, and should do no climbing.

Finally, he stated his opinion that claimant has a 44 percent loss of task performing ability. Based on the testimony and report from Dr. Koprivica, the Board finds the injury of August 1995 did not aggravate the injury of April 1995.

11. Dr. Sergio Delgado examined and evaluated claimant on October 9, 1996. He found claimant has no impairment that he would attribute to the April 17, 1995, accident. He considered the degenerative changes to be consistent with claimant's age and physical build. Dr. Delgado found no indication of myofascial pain syndrome.

12. On December 4, 1996, Dr. Peter V. Bieri performed an independent medical examination at the request of the Administrative Law Judge. For the cervical injury, he gave an impairment rating of 12 percent to the whole body with 4 percent of that 12 percent attributed to loss of range of motion. He also agreed that claimant should be limited to the medium category of work. His report gives no indication that he had the records from the Farr Chiropractic Clinic. In fact, it appears his evaluation was done before those records had been obtained.

13. Dr. Harold M. Voth, a psychiatrist, also evaluated claimant at the request of the Administrative Law Judge. He concluded claimant is malingering:

> In conclusion, I feel very confident in saying that I do not see any residual effects of the blow to his head he received while on duty. In the absence of demonstrable physical causes for his complaints and in view of their subjectivity almost entirely, I believe this man is malingering. There are clear secondary financial gains awaiting him if he can convince the Court that his complaints are related to the injury while on the job. He did state to me and he has told others that he is improving. He also has made plans to become an insurance salesman. I believe it is noteworthy that he apparently passed the test which would qualify him for that occupation. I recognize that defining his complaints of malingering is a rather forthright statement. To put it simply, his complaints simply do not add up.

14. Claimant was not working at the time of the regular hearing. He had been employed for a brief period as a mail clerk at American Investors but there were things there he could not do because of his restrictions. He had also worked at Binkley Tire for two days as a gas station attendant on a full-service island. He had applied at Penny Ready Mix, put his name on the roster for employment with Dunhill employment agency, and had put in applications at Eco Water, TruGreen-ChemLawn, Key Temporary, the State of Kansas, and Olsten's Staffing Service.

15. Respondent raised the *Boucher* defense based on K.S.A. 44-501 for the first time in its submission brief. The issue was not raised at the regular hearing or otherwise during the time open for introduction of evidence.

Conclusions of Law

1. Claimant has the burden of proving his/her right to an award of compensation and of proving the various conditions on which that right depends. K.S.A. 44-501(a).

2. Functional impairment is the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the AMA *Guides to the Evaluation of Permanent Impairment*. K.S.A. 44-510e.

3. The Board finds claimant has an 8 percent general body disability caused by the compensable accident of April 17, 1995. This conclusion is based on the opinions of Dr. Koprivica and Dr. Bieri. The Board has awarded less than the full rating by these two physicians because it appears neither was aware of limits to claimant's cervical range of motion which had been measured before this accident. The Board has not included the 10 percent Dr. Koprivica assigned to psychological factors. Dr. Koprivica testified he would defer to the psychiatrist's opinion on this question and the only psychiatrist to provide an opinion, Dr. Voth, concluded claimant is malingering.

4. K.S.A. 44-510e(a) defines work disability as the average of the wage loss and task loss:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

5. The wage prong of the work disability calculation is based on the actual wage loss only if claimant has shown good faith in efforts at obtaining or retaining employment after the injury. Claimant may not, for example, refuse to accept a reasonable offer for accommodated work. If the claimant refuses to even attempt such work, the wage of the accommodated job may be imputed to the claimant in the work disability calculation. *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). Even if no work is offered, claimant must show that he/she made a good faith effort to find employment. If the claimant does not do so, a wage will be imputed to claimant based on what claimant should be able to earn. *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

6. K.S.A. 44-510e also specifies that a claimant is not entitled to disability compensation in excess of the functional impairment so long as the claimant earns a wage which is equal to 90 percent or more of the preinjury average weekly wage.

7. If the wage imputed to claimant is 90 percent or more of the preinjury wage, claimant is limited to an award of functional impairment just as the claimant would be if he/she were actually earning such a wage. *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

8. The Board finds in this case claimant refused to attempt the security guard job offered by respondent, a position which would have paid a wage which was 90 percent of the preinjury wage. Claimant declined the offer because he did not believe it was a good faith offer. There were several factors which would tend to support that conclusion. Respondent's earlier dealings with claimant and the fact the offer was the minimum necessary to eliminate the work disability suggest respondent may have been motivated more by the effect on the workers compensation benefits paid than on the effect on claimant. Nevertheless, respondent did offer the job and while the evidence suggests the offer may have been a reluctant offer, it appears to have been a real offer. The only way to test the offer was for claimant to try the job. He did not do so, and the Board concludes the wage in that offered job should be imputed to claimant. Claimant is, therefore, limited to the disability based on functional impairment of 8 percent.

9. The Board finds claimant is entitled to future medical expenses upon proper application to and approval by the Director.

10. The Board agrees with and affirms the order assessing against respondent the cost of the service of Dr. Voth as an independent medical examiner.

11. The Board will not review the contention that claimant should be limited to an award for medical expenses based on the *Boucher* defense found in K.S.A. 44-501(c). This contention was not raised until after the last terminal date. Claimant had no reason to present evidence to address this question and the Special Administrative Law Judge did not rule on this issue. Factual issues may not be raised for the first time on appeal. *Scammahorn v. Gibraltar Savings & Loan Assn.*, 197 Kan. 410, 416 P.2d 771 (1966). The present case illustrates the reason for that rule. It appears at least part of the reason claimant missed work for therapy in the fall of 1995 and spring of 1996 was because of the neck injury. The facts were, however, never fully developed, quite possibly because this issue had not been raised.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Special Administrative Law Judge Cortland Q. Clotfelter on January 14, 1998, should be, and the same is hereby, modified.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Ricky E. Arnold,

and against the respondent, Meier's Ready Mix, Inc., and its insurance carrier, Kansas Aggregate Ready Mix Association, for an accidental injury which occurred April 17, 1995, and based upon an average weekly wage of $564.05, for 33.2 weeks at the rate of $319 per week or $10,590.80 for an 8% permanent partial disability, all of which is presently due and owing in a lump sum, less amounts previously paid.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of November 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James L. Wisler, Topeka, KS
Matthew S. Crowley, Topeka, KS
Cortland Q. Clotfelter, Special Administrative Law Judge
Philip S. Harness, Director